IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
BANKRUPTCY DIVISION
DIVISION OF ST. THOMAS AND ST. JOHN

IN RE:

Emerging Communications, Inc. Debtor	Bankruptcy No. 06-30007-JKF Chapter 11 **Related to Dkt. No. 186, Joint Motion for Entry of an Order Appointing a Responsible Officer for the Corporate Debtors and Granting Related Relief; Dkt. No. 209, Motion of the U.S. Trustee for the Entry of an Order Appointing a Chapter 11 Trustee; Dkt. No. 163, Motion for Relief from Stay;**
Innovative Communication Company, LLC Debtor	Bankruptcy No. 06-30008-JKF Chapter 11 **Related to Dkt. No. 177, Joint Motion for Entry of an Order Appointing a Responsible Officer for the Corporate Debtors and Granting Related Relief; Related to Dkt. No. 199, Motion of the U.S. Trustee for the Entry of an Order Appointing a Chapter 11 Trustee;**
Jeffrey J. Prosser Debtor	Bankruptcy No. 06-30009-JKF Chapter 11 **Related to Dkt. No. 173, Motion of Greenlight for an Order Pursuant to 11 U.S.C. §1112(b) Converting . . . from a Case Under Chapter 11 . . . to a Case Under Chapter 7 . . .**

MEMORANDUM OPINION[1]

Before the court are: Corporate Debtors' motion to appoint a responsible officer, the

[1]This Memorandum Opinion constitutes the court's findings of fact and conclusions of law. The court's jurisdiction was not at issue.

U.S. Trustee's motion to appoint a trustee in which creditors the Greenlight Entities and the Rural Telephone Finance Cooperative ("RTFC") join, and the Greenlight Entities' motion to convert Debtor Jeffrey Prosser's case to chapter 7. After full evidentiary hearings, briefing and argument, the court finds as follows:

The court accepts the illustrative Exhibit R-9 as establishing the corporate structure chart of Innovative Communication Company, LLC ("ICC LLC").[2]

Debtor, ICC LLC, is a Delaware limited liability company having its principal place of business in the United States Virgin Islands ("USVI"). It is wholly owned by Debtor Jeffrey Prosser ("Prosser"). ICC LLC is a 52 percent owner of Emerging Communications, Inc. ("EmCom").[3] ICC LLC derives its revenues solely from Emcom.

EmCom is a Delaware corporation having its principal place of business in the USVI. EmCom derives its revenues from its wholly owned subsidiary, Innovative Communication Corporation (referred to by the parties as "ICC Corp." or "New ICC").[4] New ICC owns a number of cable and telecommunications companies including Vitelco, the USVI telephone

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[2]06-30007, Dkt. No. 263, Witness and Exhibit List of RTFC for Hearing on RTFC's Motion for Relief from Stay (exhibits are listed but not docketed).

[3]The remaining 48 percent interest in EmCom is held by nondebtor ICSC-LLC, a limited liability company organized under the laws of the USVI.

[4]For purposes of this Memorandum Opinion we will refer to the current Innovative Communication Corporation as "New ICC." As a result of a reorganization effected on December 23, 1989, Innovative Communication Corporation ("ICC Corp. Old") was dissolved and liquidated and its assets transferred to Atlantic TeleNetwork Co. ("ATN Co."), a subsidiary of EmCom, in exchange for preferred stock, which was transferred to Innovative Communication Company, LCC ("ICC LLC") in the liquidation. ATN Co. changed its name to Innovative Communication Corporation, referred to alternatively by the parties as "ICC Corp." or "New ICC."

company and the "ICC Operating Companies."[5] New ICC, Vitelco and the USVI ICC Operating Companies are corporations formed pursuant to the laws of the USVI, having their principal places of business in the USVI. Vitelco's annual revenues exceed $65 million and, with the ICC Operating Companies, it is the single largest private employer in the USVI.

Vitelco, as the telephone company, is a public utility of the USVI, and operates under a franchise granted by the USVI Government. That franchise may be terminated on two years' notice without cause and immediately for cause. By statute, the Public Service Commission ("PSC") is the regulatory body.

The court also accepts the undisputed background of the cases as follows. The Greenlight Entities' principal place of business and base of operations are in New York. The Greenlight Entities' claim against ICC LLC derives from a judgment entered in the Delaware Chancery Court against (i) ICC LLC, (ii) Innovative Communication Corporation (a dissolved Virgin Islands company and not to be confused with New ICC), and (iii) Prosser. The judgment is for $56 million, plus 6.7 percent interest compounded monthly. This judgment, together with the Greenlight Entities' separate judgment against EmCom, arises out of the privatization of

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[5]The ICC Operating Companies are St. Croix Cable TV, Inc., and Caribbean Communications Corporation, cable companies in the U.S. Virgin Islands which own and operate the cable television system in St. Thomas, St. Croix, and St. John; Vitelcom Cellular, Inc., operates a cellular wireless company in the USVI. Daily Publishing Co., Inc., owns and operates the largest daily newspaper in the USVI. St. Croix Cable, Vitelcom Cellular and Daily Publishing, together with several other operating companies in the U.S. Virgin Islands, St. Martin, Martinique, and Guadeloupe of the French West Indies, St. Maarten of the Netherlands Antilles, and the British Virgin Islands (collectively, the "ICC Operating Companies") are all subsidiaries of nondebtor. ICC Corp, is 100 percent owned by EmCom.

The ICC Operating Companies, operating under licenses and franchises granted by their respective governments, are (except for Daily Publishing) public utilities.

EmCom.[6]

The judgments were entered in Delaware Chancery Court on January 9, 2006, although the opinion upon which they are based was revised, in final form, over a year and a half earlier on June 4, 2004. On January 17, 2006, the Greenlight Entities domesticated the judgments in the USVI.

RTFC is a Virginia based cooperative lender engaged in providing financing to telecommunications companies. Although it has a separate board of directors, it has only one employee and is a controlled entity of the National Rural Utilities Cooperative Corporation ("CFC"). RTFC's sole source of funds is CFC. RTFC and CFC have common management, counsel and auditors. CFC, a public company, is a cooperative lender that lends primarily to public power utilities. From 1987 to the present, RTFC acted as the principal lender to nondebtor, New ICC, which loans have been guaranteed by, *inter alia*, ICC LLC's direct subsidiary, EmCom. These loans are in excess of $500 million and are secured, *inter alia*, by guarantees and/or stock pledges by all three Debtors.

The lending relationship between RTFC and New ICC was the subject of litigation pending in the Virgin Islands District Court. During the course of these bankruptcies, that litigation has been discontinued. After the RTFC learned that the Greenlight Entities had obtained a favorable ruling in Delaware, RTFC initiated a foreclosure action against New ICC in the USVI alleging 31 non-monetary defaults. That foreclosure action has also been terminated. At some point, RTFC withdrew most of its foreclosure claims.

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[6]These judgments were subject to an appeal. During the course of these bankruptcy cases, all appeals were voluntarily dismissed.

After the Delaware Chancery Court issued its opinion and most of the RTFC's alleged defaults against New ICC had been dismissed by consent or summary judgment in the Virgin Islands District Court litigation, the Greenlight Entities and the RTFC in October of 2005 entered into a joint venture under an intercreditor agreement. Under the intercreditor agreement. RTFC purchased the judgments from the Greenlight Entities for $27.5 million. The Greenlight Entities, in turn, agreed to file the involuntary petitions.

Vitelco sought an injunction from the United States District Court in the USVI litigation to prevent RTFC and the Greenlight Entities from effecting, through the intercreditor agreement, a change in control of Vitelco without prior PSC approval. The District Court denied the relief finding that no change in control would be effected under the circumstances.

On January 9, 2006, the Delaware Chancery Court entered two judgments in favor of Greenlight. The first judgment was entered in favor of Greenlight against EmCom in the principal amount of $28,548,915.

On or about January 9, 2006, the Chancery Court entered a second judgment based on breach of fiduciary duties against ICC LLC, Prosser, and a dissolved USVI corporation, "Old ICC" (the predecessor in interest to New ICC) in the principal amount of $56,341,843.

EmCom, Prosser and ICC LLC appealed the Delaware judgments to the Delaware Supreme Court. Thereafter, on or about February 10, 2006, the Greenlight Entities filed involuntary petitions with respect to the Debtors in the Bankruptcy Court for the District of Delaware.

On February 13, 2006, the Debtors filed a motion to transfer venue to the USVI and on March 6, 2006, a motion to dismiss in the involuntary cases. The motion to dismiss the

involuntaries was withdrawn on or about August 18, 2006. On August 2, 2006, the Greenlight Entities filed a motion to determine venue. In December 2006, this court issued an opinion finding and entered an order directing that venue was appropriate in the USVI.

A motion for reconsideration resulted in a reiteration of that ruling by opinion and order dated February 13, 2007. In the meantime, the motions for appointment of a responsible officer and for appointment of a trustee were filed in the corporate cases, and a motion for conversion was filed in Prosser's individual case.

On March 3, 2006, this court approved a stipulation among Debtors, the Greenlight Entities, and the RTFC which modified the automatic stay applicable to the involuntary cases to permit the Delaware state court appeals to proceed.

In April 2006, the Debtors, New ICC, the Greenlight Entities and the RTFC entered into an agreement referred to as "Terms and Conditions of Settlement Claims dated April 26, 2006" ("Terms and Conditions" or "Settlement").[7] At the May 4, 2006, status conference before this court, the parties advised the court of this settlement.

Pursuant to the Terms and Conditions, the Delaware appeals were dismissed with prejudice. The Terms and Conditions also provided that the Debtors would have until July 31, 2006, to make a discounted payment in the amount of $402 million to the Greenlight Entities in full satisfaction of their respective claims. The Terms and Conditions, upon information and belief, further authorized the RTFC to secure certain judgments in the U.S. District Court for the Virgin Islands against certain Debtors.

The Greenlight Entities now hold judgment liens for the amounts of the Delaware

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[7]06-30009, Dkt. No. 174, Exhibit G-4.

judgments, and the RTFC now holds a judgment for an amount in excess of $500 million against certain of the Debtors.

Since the execution of the Terms and Conditions of Settlement, the Debtors have been attempting to secure financing to fund the Settlement. When they were unable to do so and unable to make the discounted payment provided for thereunder by July 31, 2006, the Debtors commenced the above captioned voluntary Chapter 11 cases on July 31, 2006, in the USVI. The Debtors continue to operate their respective business as Debtors-in-Possession.

At the time of the filing of the voluntary petitions, the Debtors advised this court that they intended to use the sixty-day window afforded them under 11 U.S.C. §108 to continue their efforts to secure financing to fund the Settlement and, although they had not secured binding financing commitments, they filed a joint motion to assume the Settlement in September of 2006. The court at that time entered a scheduling order setting the assumption motion for November. The scheduling order also provided that the Debtors would file an amended assumption motion on or before November 3, 2006, with a binding commitments that had no financing contingencies and no unsatisfied due diligence conditions. Debtors were also required to include a timetable.

On November 3, 2006, the Debtors filed the amended assumption motion without the required binding commitment. On November 7, 2006, after a hearing, the court denied the Debtors' request to assume the Settlement because of "impossibility of performance."

On November 22, 2006, the Debtors filed their joint motion to extend the exclusive period for filing a chapter 11 plan and disclosure statement. In that motion, the Debtors revealed for the first time that they had terminated the letter of intent upon which the amended assumption

motion was predicated. The Debtors further noted that this was done so they could pursue a deal with the government of the Virgin Islands to sell certain assets of the Debtors' subsidiaries.

In December of 2006, this court held a hearing on the exclusivity motion at which time, noting the distrust existing between the major constituencies in this matter and the Debtors' continuing inability to obtain any commitment for the sale of assets, suggested that the appointment of a trustee might be appropriate in these cases. The U.S. Trustee filed a motion to appoint a trustee in the corporate cases. The motion is supported by the Greenlight Entities and the RTFC which together hold at least 90 percent of Debtors' outstanding debt. We note that even the Debtors, as evidenced by their filing a motion for the appointment of a responsible officer for the corporate debtors, have confirmed the need for the appointment of an independent fiduciary in the corporate Debtors' cases. The U.S. Trustee objected to the responsible officer motion on the basis that there is but one remedy established by Congress to supplant management with a court appointed fiduciary while allowing the case to remain in chapter 11 and that is the appointment of a trustee pursuant to 11 U.S.C. §1104(a). The U.S. Trustee argues that equitable principles cannot be used to circumvent clear Congressional intent. *See e.g., In re Columbia Gas Systems, Inc.*, 33 F.3d 294, 300 (3d Cir. 1994)(superseded by statute on a different point of law); *U,S. Trustee v. Price Waterhouse*, 19 F.3d 138, 142 (3d Cir. 1994). In addition, 11 U.S.C. §105(a) can only be used to carry out provisions of the Bankruptcy Code, not to graft new provisions onto the statute that Congress neither enacted nor intended.

The exclusive period was extended through the date set for the evidentiary hearing regarding the appointment of a trustee or responsible officer. Debtors also filed a plan without an accompanying disclosure statement, and are now in the exclusive solicitation period.

The Corporate Debtors' Motion to Appoint a Responsible Officer
Dkt. No. 186 in 06-30007; Dkt. No. 177 in 06-30008

After due consideration of the evidence, briefs and arguments of counsel, the court concludes that, under the facts of these cases, it cannot grant this motion.

Debtors suggest that a responsible officer, rather than a trustee, would serve the situation facing the parties and that the court has the authority to enter an order to this effect under §105. The cases relied upon by Debtors all involved facts much different from those in this case. In those cases, either the court appointed a person to act on behalf of the debtors because there was no board of directors when the bankruptcy was filed as in *Matter of FSC Corporation*, 38 B.R. 346 (Bankr.W.D.Pa. 1983), or there was no objection lodged to the appointment as in *Matter of Gaslight Club, Inc*., 782 F.2d 767 (7th Cir. 1986). In *In re Communication Options, Inc*., 299 B.R. 481 (Bankr.S.D.Ohio 2003), the court noted that its review of case law indicated that appointment of a responsible officer had been used primarily in cases where management was nonexistent or when parties agreed. 299 B.R. at 482. In *Communication Options* the court appointed a responsible officer, rather than a trustee, on the creditors' request over the debtor's objection because the debtor was found to have misused the chapter 11 process, not to reorganize, but to delay payment of debts and to protect insiders. However, the case had been pending for three years before anyone brought the matter to the court's attention and, by that time, two plans were of record. The court determined that appointing a trustee would cause further delay and add expense that was not necessary because, by use of a responsible officer, the court could control costs, move the case, and terminate the debtor's nonproductive delay tactics. In each of these cases, however, a creditor initiated the proceeding.

In more recent cases, courts have opined that use of a responsible officer ought to be

limited to extraordinary circumstances, especially in light of §1104 that requires appointment of a trustee where a fiduciary is needed to take control of the estate. *See In re Stratesec, Inc*., 324 B.R. 158 (Bankr.D.D.C. 2004)(receiver for chapter 11 debtor corporation not appointed as responsible officer where proof did not exist that all creditors, among others, supported motion and one creditor objected; extraordinary circumstances not shown). *See also In re Adelphia Communications Corp.*, 336 B.R. 610 (Bankr.S.D.N.Y. 2006)(questioning court's authority under §1107 to appoint non-trustee fiduciary to act on behalf of the estate, particularly where the major issues involved inter-debtor disputes in a multi-debtor case even though the appointment seemingly would not breach pending agreements for purchase of assets; duties of non-trustee fiduciary would have to be defined by the court and court should not exercise such discretion except in unusual circumstances).

In this case, Debtors contend that a responsible officer would take control of the negotiations regarding a sale or refinance of the Prosser entities and would be the only corporate representative to make recommendations to the court on that issue. Prosser testified that the boards of directors would consent to this process and would amend any corporate documents necessary to effectuate its implementation.[8] The U.S. Trustee and the major creditors, the Greenlight Entities and the RTFC, object on the grounds that Prosser would still control the entities and the process, that the responsible officer would not be a fiduciary for the estate but would still report to the corporate boards and to Prosser, and that §1104 is the exclusive means by which the court can appoint a fiduciary for the estate. The court notes that Debtors have not sought to employ a turnaround manager or to add an employee to their businesses. In fact,

[8]Transcript of 1/19/07 at 53.

neither Corporate Debtor has any employees and both the U.S. Trustee and the creditors have suggested that their opposition to this motion, which seeks court appointment of a nonestate fiduciary with no specified duties and no obligation to act in the interests of creditors, is not to be treated as opposition to a motion Debtors did not file – *i.e.*, to use funds outside the ordinary course of business to hire an employee.

The parties quite candidly argue that the case is all about control of the negotiation process. The creditors have no confidence in Prosser, and Prosser has no trust in them. Thus, the only way to get all parties to cooperate is to put a neutral person in charge of the process. Cooperation is vital to the reorganization of the Debtors. If the parties cannot agree to the amount and status of the claims, the cases may be in litigation for many more years, while Debtors make no payments on the judgments or on accruing interest or even on the $402 million that was agreed to under the Terms and Conditions. Further, no buyer has stepped forward with an offer to show what the fair value of the enterprise is, no one has tried to value the components of the enterprise to determine just how much of the allegedly secured claims are really supported by value and, in general, the process is mired.

Thus, until someone other than Prosser or the creditors assumes the responsibility for finalizing a deal, it appears that one will never be reached. To that end, the court cannot agree with Debtors that a responsible officer will have either the confidence of the creditors or the freedom from Prosser's influence to do what must be done to evaluate the true worth of the enterprise, to find investor(s) or buyer(s) or lender(s) and to stabilize the business.

There are other issues that must be addressed by someone outside the Prosser organization. One issue involves the financial statements of the Prosser parties. Witnesses

experienced in accounting principles testified that financial statements must continue to reflect accumulated interest until there is a final determination that the obligation underlying the interest is no longer due.[9] This is so even though the company may dispute the obligation to pay interest. In this case, Prosser disputes the obligation to pay interest due to the negotiated $402 million discounted payment. However, whether the discount is still applicable is itself in dispute. None-the less, the consolidated financial statements for the Prosser entities are no longer reflecting accumulating and unpaid interest on the final judgments that likewise remain unpaid. Interest accumulates at the approximate amount of $12 million per month or $144 million per year. Not reporting the dispute or reflecting the possibility that $144 million per year will be added to the debt of the Debtors (either as principals or as guarantors) is clearly a material matter that requires someone with no tie to Prosser to investigate. The independence of a trustee is needed for this purpose.

Assuming without deciding that the creditors are correct that the $402 million is now "off the table" and that the judgments are now in excess of $656 million with interest accumulating at the rate of $12 million per month, even businesses that generate as much cash as the Prosser entities cannot long survive. If the Debtors are correct that the $402 million amount under the Terms and Conditions is still viable even though they were to make the payment by July 31, 2006, and were unable to do so, then the time has come for someone to ascertain whether there is any investor/buyer/lender willing to come forward expeditiously and make an offer that will pay the $402 million plus amounts owed to other creditors such as the $85 million owed to preferred shareholders of Vitelco if Vitelco is sold. Only then will there be any

[9]Transcript of 1/9/07 at 215-19.

possibility that Prosser will be entitled to a distribution as an owner. Although Debtors have reported that several entities have shown an interest in purchasing various assets of the nondebtor operating companies since the involuntary and voluntary cases were filed, there have been no offers nor completion of due diligence or anything resembling a binding offer by any entity.

Moreover, although Matt Michaelis, Prosser's investment banker, testified that he has not seen Prosser refuse to negotiate with entities that express no interest in retaining him in some capacity,[10] the court heard no evidence from anyone as to what Prosser would do for income in the event that the companies are all sold out from under him. He has substantial personal debts and contributes to the payment of his wife's debts.[11] His wife is not employed but many of the assets valued at several million dollars (and subject to debts of millions of dollars) are titled in her name.[12] Because of this circumstance, the court is not convinced that Prosser can distance himself from the negotiations sufficiently to consider the obligations he owes his creditors before his own interests.

This is not to say that a neutral negotiator should not also consider Prosser's interests. Those interests should be considered and be part of the chapter 11 plan negotiation process. However, they should not have a more predominant role than any other factor. A trustee with fiduciary status is needed to insure that there is fundamental fairness to all concerned.

Thus, the court will deny the motion to appoint a responsible officer and will grant the

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[10]*See* Sealed Transcript of December 11, 2006, at 17-94.

[11]06-30009, Dkt. No. 26, Schedules.

[12]Transcript of 1/19/07 at 89-98.

motion to appoint a chapter 11 trustee.

The United States Trustee's Motion to Appoint a Chapter 11 Trustee
Dkt. No. 209 in 06-30007, Dkt. No. 199 in 06-30008

Appointing a chapter 11 trustee is a serious matter and not one to be undertaken lightly. The evidence must establish the need for a trustee clearly and convincingly. Although chapter 11 is designed to allow debtors to remain in possession and control, if there is clear and convincing proof that either cause or need exists for a trustee, it is in the court's discretion whether to appoint one. *In re Adelphia Communications Corp*., 336 B.R. 610, 655-66 (Bankr.S.D.N.Y. 2006). In *Adelphia* , the court declined to appoint a trustee because, although there were interdebtor and intercreditor disputes, that fact alone did not establish fraud, mismanagement or misconduct constituting cause under §1104(a)(1). In addition, the criticism of the debtors in *Adelphia* was that they maintained neutrality with respect to the intercreditor disputes. Section 1104(a)(2) calls upon the court's exercise of discretion on a case by case, factual basis. Some of the factors include the trustworthiness of the debtor, the debtor's past and present performance and prospects for rehabilitation, the confidence or lack thereof in the current management of the business community and of creditors and the benefits to be derived by the appointment of a trustee. *Adelphia, supra,* 336 B.R. 658.

The standard under § 1104(a)(2) is flexible. *In re Sharon Steel Corp.,* 871 F.2d 1217, 1226 (3d Cir. 1989). Where a fiduciary is "plainly necessary" appointment of a trustee is indicated. *In re Stratesec, Inc.,* 324 B.R. 158, 160 (Bankr.D.D.C. 2004).

The U.S. Trustee seeks appointment of a chapter 11 trustee for the corporate cases pursuant to §1104(a)(2) as in the best interests of the creditors and interest holders. The U.S. Trustee asserts that there has been virtually no progress in these cases even though the

involuntaries were filed in February of 2006, that Debtors are failing to exercise their fiduciary responsibility to timely rehabilitate these cases, and that, because Debtors have lost the trust of the creditors, there will be no progress as long as Debtors remain solely responsible for the disposition of estate assets.

The RTFC and the Greenlight Entities have acknowledged their lack of confidence and trust in Prosser and those members of the boards of directors of his corporations who, like him, were found to have breached their fiduciary duties to Greenlight in the "going private" transaction, leading to the Greenlight judgments described earlier.[13] The RTFC also points out that, since 1987, it has been the primary lender to the Prosser entities for over $500 million, which loans are secured by guarantees and/or stock pledges by the three Debtors, all of which are now in default even though the RTFC extended due dates and renegotiated certain of the loans several times. The RTFC's judgments exceed $500 million.

The court accepts the U.S. Trustee's recitation in its motion to appoint a trustee as accurately reciting the history of the cases and the efforts Debtors made to secure financing or buyers for the Prosser entities. *See* 06-30007 at Dkt. No. 209, 06-30008 at 199. The U. S. Trustee is correct that all of the evidence shows that although there has been considerable maneuvering by Debtors while they have had exclusive charge of the cases, there has been no landing.[14]

Debtors contend that ther several variations of offers and expressions of interest by a

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[13]Transcript of 1/9/07 at 165-66.

[14] Again, the court does not recite all of the evidence, most of which is under seal, regarding what Debtors have done. The point to be made is that despite Debtors' marketing efforts, there is no deal on the table.

variety of lenders/buyers/investors constitutes progress. At this stage of the bankruptcy cases, the court disagrees. Debtors have appeared before the court numerous time, as recited in the UST's motion, each time reporting that a binding commitment was forthcoming. To date, despite all of Debtors' assurances, no binding commitment has been obtained and none is any longer promised. The record, therefore, clearly and convincingly refutes Debtors' assertions of "progress" and shows, instead, efforts that have led to nothing more than a holding pattern.

The U.S. Trustee also contends that the level of acrimony in these cases is such that the court should appoint a trustee to deal with the sharp divisions between the parties. The court is not convinced that the acrimony, by itself, would warrant a trustee. The parties were able, during the involuntaries, to arrive at the Terms and Conditions that purported to be a global resolution of all of their disputes. Unfortunately, the lack of money to pay the $402 million that was due on July 31, 2006, reinstated the hostility that characterized years of litigation before the Terms and Conditions were agreed upon. Even more unfortunately, the parties are now embarked on a course of litigation in these cases which, coupled with the acrimony between them, clearly and convincingly demonstrates to the court that a neutral party is needed to investigate and determine whether or not to pursue (or defend, as the case may be) actions on behalf of the estates. Further, Debtors have filed a joint plan, without a disclosure statement, which effectuates a "deemed" substantive consolidation, and which they concede is unconfirmable but which, according to their counsel, was intended to foster negotiations with the creditors.[15] Instead, the plan generated even more hostility than existed before it was filed. Such

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[15]Transcript of 1/9/07 at 28-29, 52-54 (the plan looks to a variety of sources for funding but Debtors are still not finished with the process; proposed plan includes releases of New ICC, a (continued...)

a serious misread of what the creditors' reaction to the plan would be is further clear and convincing evidence of the need to separate the parties with a neutral. In addition, the court does not believe that a desire to foster negotiations was the sole basis for filing the plan, despite counsel's assurances. At the time, Debtors were battling allegations that their exclusive period had terminated or would soon terminate and the court finds that filing the plan was intended to extend the exclusivity period, thereby providing more time for Debtors to put together a sale or refinance of the Prosser entities. Whereas the filing of the plan in fact extended the exclusivity period, it has not resulted in a deal that would pay even a penny to the creditors.

The PSC and the Debtors[16] object to this motion, asserting that appointment of a trustee will effect an indirect change of control that will violate Virgin Islands law because it has not received the prior approval of the PSC. Section 43a of title 30 of the Virgin Islands Code provides that no person or corporation shall sell, acquire or transfer control, either directly or indirectly, of any public utility organized and doing business in the Virgin Islands without first securing authorization from the PSC. The statute then states that "[a]ny such acquisition or control without prior authorization shall be void and of no effect." The court disagrees that

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[15](...continued)
nondebtor, the source of all the Debtors' funds; plan filed because creditors want finality; plan filed to provide a runway and throw the keys on the table to show that Debtors are open to finality, transparency; Debtors knew Greenlight and RTFC said they would oppose any plan that did not pay their claims in full but amount stated in plan for their claims is not based on current situation but on settlement amount of $402 million).

[16]Debtors' standing to raise this point, especially when the PSC has been granted party in interest status for this very purpose, is questionable. Debtors clearly are not the regulatory agency responsible for representing the people of the Virgin Islands. In fact, through the Prosser entities, they currently OWN the regulated industry. Thus, the objection is equally as clearly motivated by Debtors' self interest without regard to what is in the best interest of the creditors of the estates.

appointing a trustee will effect any more of an indirect change in control than already exists in these cases. The court accepts the reasoning in the RTFC's brief in support of its joinder in the U.S. Trustee's motion to appoint a trustee, 06-30007 Dkt. No. 330, and overrules the objection for the following reasons:

1. Nothing in the Bankruptcy Code cedes the power and authority of the federal courts (to an appointed regulatory commission with limited functions) to determine whether appointment of a trustee is required under §1104, or of the United States Department of Justice through the Office of the United States Trustee to select the person to serve as the trustee if the court orders one to be appointed. In *FCC v. Nextwave Personal Communications Inc.,* 537 U.S. 293, 302 (2003), the U.S. Supreme Court noted that Congress provides regulatory exceptions to the Bankruptcy Code clearly and expressly, not by subtle devices, such as by exemption from the automatic stay in §362(b)(4). There is no such exception to the appointment of a trustee in §1104.

In so stating, the court does not denigrate the responsibility of the PSC. As stated on the record several times, the court is of the view that the PSC's regulatory function is in harmony with the court's function to assure that any plan of reorganization, or sale of assets, comports with state/territorial law. The PSC's regulatory function, stated broadly, is to ensure that the people of the USVI have adequate public utility service and that the provider has the means and ability to provide the required service. Accordingly, the PSC will have to authorize a transfer of control of the public utility. In this regard any sale of assets proposed in these bankruptcy cases or any plan of reorganization will be subject to consultation with the PSC by the chapter 11 trustee.

Moreover, it is a stretch to interpret the language of §43a of title 30 of the Virgin Islands Code which provides that no "person or corporation shall sell, acquire or transfer control" to include appointment by a court of a trustee for the estate. Indeed, to date, no case in any jurisdiction has done so. First of all, the court is not governed by any regulatory body. Although the PSC and Debtors contend that the PSC's interpretation is entitled to deference, the court has not been provided with any regulatory process or document that interprets §43a. Further, although it is appropriate to give "substantial deference" to a regulatory agency's interpretation of its own regulations, *see, e.g., In re Nextwave Personal Communications, Inc.*, 200 F.3d 43, 58 (2d Cir. 1999), here we are not concerned with the interpretation of regulations but of the Bankruptcy Code and of a Virgin Islands statute. Moreover, the PSC and this court have the same ultimate goal with respect to provision of telephone service in the USVI which is to ensure that it is uninterrupted.

The PSC's counsel has opined that the PSC will treat the appointment of a trustee as void under the statute. In this regard we refer counsel to the Supremacy Clause of the U.S. Constitution, which both this court and the Virgin Islands recognize. An order of this court made within its jurisdiction (and it is indisputable that this court has jurisdiction to order the appointment of a trustee) is entitled to the full faith and credit within the Virgin Islands. State action in derogation of federal authority is unenforceable when valid federal legislation preempts state authority. *In re Kreisers, Inc.,*112 B.R. 996, 998 (Bankr.D.S.D. 1990)(citing *Blum v. Bacon,* 457 U.S. 132 (1982)). The Bankruptcy Code is valid federal legislation, the exclusive power for which resides in Article I, section 8 of the United States Constitution.

2. The corporate entities that are in bankruptcy and as to which the trustee will be

appointed are NOT the public utility. Vitelco, the public utility, is two levels below EmCom in the corporate structure and three levels below ICC LLC which are the Corporate Debtors. Thus, as the parties concede, appointment of a trustee can at best involve only the indirect control of a grandparent and great grandparent of the utility. The court finds that the appointment does not effect even that level of indirect change in control. However, the court notes as well that the RTFC holds a perfected lien on the stock of Vitelco, a transaction to which the PSC consented. The lien of the RTFC on the Vitelco stock was conveyed to secure ICC's repayment of debt owed to the RTFC. The RTFC holds the stock in its possession and is perfected therein. The RTFC's judgment for over $500 million is now final and unpaid and, but for the automatic stay, the RTFC could begin to exercise its lien rights, including voting the stock, even though it may require PSC involvement prior to doing so. The RTFC concedes that no foreclosure or change in ownership of Vitelco can occur without the prior approval of the PSC. *See* RTFC's Brief in Support of its Joinder . . . ., 06-30007, Dkt. No. 330 at ¶ 4. Thus, the PSC has already agreed to a change in control of Vitelco but has reserved the right to approve a change in ownership and foreclosure. Any change in control of Vitelco, if and when it occurs, will be a direct one.

3. The Debtors filed voluntary petitions in bankruptcy in July of 2006 and were subject to involuntary petitions from February of 2006. The orders for relief were entered when the Debtors filed the voluntary bankruptcy petitions on July 29, 2006, in the USVI. At that time, the Debtors became debtors in possession with fiduciary duties to their creditors. Debtors did not seek PSC consent to file the voluntary cases, nor were they required to do so. However, debtors in possession are estate representatives that function as trustees, and are not the same legal entity as the prepetition corporations. Section 1107(a) provides in relevant part:

> . . . a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties . . . , of a trustee serving in a case under this chapter.

Thus, by filing the bankruptcy cases, the Debtors took on the role of a trustee unless and until a chapter 11 trustee is appointed. If having a trustee represents a change in control, then having a debtor in possession necessarily does as well, by virtue of §1107(a).

4. Debtors attempt to distinguish *In re West Electronics*, *Inc.*, 852 F. 2d 79 (3d Cir. 1988), as turning on a construction of §365(c) that has been often criticized for its "separate entity" analysis. Debtors cite *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), wherein the court recognized, for that case, that the debtor in possession was the same entity as the prepetition company but with the ability by virtue of the Bankruptcy Code to deal with its contracts and property in a manner that it could not have used absent the bankruptcy.

Debtors argue that in this case, as in *Bildisco,* the legal distinction between debtor and debtor in possession did not change the identity of the persons charged with decision-making authority for purposes of the Virgin Islands Code. That may be. Nonetheless, even without bankruptcy the decision makers within a company could be changed without effectuating a "change in control" via ownership of the stock. As applied to this case, Prosser testified that he is not in day to day operational control of the entities. He has a large staff that carries out that function and a chain of command, the higher positions of which report to him. Thus, at any time, Prosser could change the managerial control of the enterprises (and indeed, he has done so by hiring people from time to time) and there was no evidence that he sought or obtained PSC approval prior to doing so.

Moreover, the ownership of the stock could change without effectuating a change in

management. Thus, exactly what is meant by "change in control" in the Virgin Islands statute is subject to interpretation of the law which is a judicial, not a regulatory, function. The more reasonable interpretation is that the PSC, charged as it is with regulating utilities for the benefit of the public and in the public interest, is most concerned with ownership, to be certain that the owner has the financial ability to carry out the business functions and the technical expertise to retain management staff, but not with the minutia of who each employee is and what function he or she serves on a daily basis. This interpretation is consistent with the 1989 agreement between the PSC, Vitelco, RTFC and the predecessor to nondebtor New ICC (then known as ATN),[17] which requires PSC approval only when the transfer of controlling stock in ICC or Vitelco is involved. *See* RTFC Brief in Support, 06-30007, Dkt. No. 330 at ¶¶ 7-9, 32, 33 and Exhibits cited therein. This interpretation comports with that of the Federal Communications Commission and other state/territorial public utility commissions in their approach to appointment of a trustee; *i.e.*, to treat it as a *pro forma* event. *See* RTFC Brief, 06-30007, Dkt. No. 330, ¶ 8, and Exhibits, cases and statutes cited therein. *See also In re Applications of Kirk Merkley, Receiver,* 94 F.C.C.2d 829, 837 (1983).

RTFC's Motion for Relief from Stay

The court also noted on the record at the hearing on January 24, 2007, that appointment of a trustee would constitute adequate protection for the RTFC regarding its contention in support of its motion for relief from stay that the value of the collateral supporting its liens is declining. 06-30007 at Dkt. No. 404, 06-30008 at Dkt. No. 383. Without reiterating the ruling,

[17]A reorganization was effected by which "ICC Corp. Old" was dissolved and liquidated and its assets were transferred to ATN in exchange for preferred stock. The stock was then transferred to Debtor ICC LLC. ATN became New ICC/ICC Corp.

the court merely confirms that the appointment of a trustee is also intended to provide adequate protection for the RTFC as to its secured claims, pending further order.

The Motion to Convert Prosser's Case from Chapter 11 to Chapter 7, filed by the Greenlight Entities

Greenlight seeks conversion pursuant to §1112(b) for cause. The RTFC has joined in the motion. Prosser objects. The Court is required by the relevant portions of §1112(b) to convert the case if cause is established. "Cause" is not defined in the Bankruptcy Code, although Congress has provided 16 enumerated examples. *In re Jayo*, 2006 WL 2433451 (Bankr.D.Idaho, July 28, 2006). Of necessity, the determination of whether cause exists must be done on a case by case basis. *In re Adbrite Corporation.,* 290 B.R. 209, 218 (Bankr.S.D.N.Y. 2003). The court should not "precipitously sound the death knell for a Chapter 11 debtor by prematurely converting . . . the case. *In re Northeast Family Eyecare, P.C.,* 2002 WL 1836307 *3 (Bankr.E.D.Pa,. July 22, 2002), quoting *In re Tracey Service Company, Inc.*, 17 B.R. 405, 409 (Bankr.E.D.Pa.1982).

Greenlight makes certain allegations for which the court finds it unnecessary to delve in detail into the evidence of record because there is ample evidence on other points that will serve as the basis for the court's decision. As to the allegations that the court will not provide detailed analysis, *see* Motion of Greenlight for an Order Pursuant to 11 U.S.C. §1112(b) Converting Jeffrey J. Prosser's Bankruptcy Case from a Case under Chapter 11 of the Bankruptcy Code to a Case Under Chapter 7 of the Bankruptcy Code, 06-30009 at Dkt. No. 173, ¶ 31 - 57. These include the assertion that acrimony between the parties is so extreme that conversion is warranted. There is hostility between Prosser and Greenlight but, at this time, there is insufficient evidence to find that the acrimony is so intense that conversion is the only remedy.

The court recognizes that some cases stand for the proposition that prepetition dishonesty, including preparation of financial statements that contain significant misstatements, can be grounds to appoint a trustee. Here, however, the major problem with the case to date has not been the value of the claims – whether they are $656 million or $402 million, they are still unpaid. The problem is that there is no definitive arrangement by which the debt will be paid in whatever amount it is finally allowed. Conversion will not assist in resolution of that situation at this time.

Greenlight also asserts that Prosser failed to timely comply with certain reporting requirements of the Bankruptcy Code, a deficiency which Prosser has cured. Greenlight disputes some of the information in Prosser's schedules, including Prosser's failure to list New ICC as a creditor, the listing of the RTFC's and Greenlight Entities' claims in their "settled" amounts rather than in the amounts of their judgments, and similar contentions. However, the fact that Prosser sees the claims differently than the creditors do is not grounds to convert the case. Rather, that is the function of claims litigation, settlement discussions, etc., all directed toward confirmation of a plan. The court notes that Prosser's attorneys have explained why they have listed certain claims as disputed, contingent and unliquidated, even though they are now subject to final judgments. The explanation is that the court has not yet approved the Terms and Conditions and, in the event that they are not approved, Prosser believes he has the ability to seek relief from the final judgments, thereby making them subject to dispute. The court offers no opinion on the merits of that contention at this time. Regarding Prosser's various bankruptcy attorneys' failure to file Bankruptcy Rule 2016(b) statements, counsel have represented to the court, and the court accepts the representation, that counsel are now in compliance.

As to matters that merit discussion, Greenlight alleges Prosser's gross mismanagement of his bankruptcy estate based upon intercompany transfers that allegedly raise questions as to Prosser's ability to discharge his fiduciary duties as a debtor-in-possession. The audited consolidated financial statements show "net advances"[18] to Prosser of approximately $13 million in 2005[19] and 2004[20] and of over $14 million in 2003,[21] at a time when Prosser was personally indebted to New ICC in an amount in excess of $156 million.[22] Prosser testified that ICC LLC, not he, was the recipient of all of the net advances except annual advances of approximately $1 to$2 million,[23] and that he has submitted information to the auditors so that they can correct the errors on the reports. Corrected reports have not been produced nor has the testimony of an auditor been introduced to show that, in fact, the statements were in error. Even if true, Prosser

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[18]Transcript of 1/9/07 at 110-25 (testimony of Jeffrey Prosser); *id.* at 201-225 (testimony of Bobby Lubana). New ICC booked these "ent advances" in Notes and Accounts Receivable as "contra equity."

[19]Innovative Communication Corporation and Subsidiaries: Consolidated Financial Statements for the Years Ended December 31, 2005, and 2004, Exhibit G-14 on Greenlight's Witness and Exhibit List for Hearing on Greenlight's Motion for an Order Pursuant to 11 U.S.C. §1112(b) Converting Jeffrey J. Prosser's Bankruptcy Case from a Case Under Chapter 11 of the Bankruptcy Code to a Case Under Chapter 7 of the Bankruptcy Code, 06-30009, Dkt. No. 174 (exhibits are listed but not docketed).

[20]*Id.*

[21]Innovative Communication Corporation and Subsidiaries: Consolidated Financial Statements For the Years Ended December 31, 2004, and 2003, 06-30009, Dkt. No. 174, Exhibit G-15 at 6.

[22]Innovative Communication Corporation and Subsidiaries: Consolidated Financial Statements for the Years Ended December 31, 2004, and 2003, 06-30009, DKt. No. 174, Exhibit G-14.

[23]Deposition of Jeffrey J. Prosser, 06-30009, Dkt. No. 174, Exhibit G-16 at 114-15, 133-34; Jeffrey J. Prosser's Statement of Financial Affairs, *id.* at Exhibit G-6.

is the sole owner of ICC LLC and directly benefits from advances to it by utilizing it as a "check the box" corporation which he reports on his personal tax returns.[24] Moreover, Prosser admits that neither he nor ICC LLC can repay the advances.[25] Prosser lists the total value of his assets as $16,545,306 plus his interest in ICC LLC and his debts as $164,661,843.[26]

Section 1112(b) governs conversion of a case from chapter 11 to chapter 7. Conversion is warranted if it is in the best interests of the creditors and of the estate and if cause exists. Factors that constitute cause are enumerated in §1112(b)(1) but the list is not exhaustive. *See Loop Corp. v. U.S. Trustee*, 290 B.R. 108, 112 (D.Minn. 2003), citing cases. If the court finds that there are grounds to convert a case under §1112 but that the appointment of a trustee or examiner under §1104 is in the best interests of the creditors and the estate, the court may so order pursuant to §1104(a)(3). For the reasons which follow, the court has determined that the appointment of an examiner is in the best interests of the creditors and the estate at this time and will deny the motion to convert without prejudice, in favor of appointing an examiner. To effectuate the order, the court also will order Prosser's full and complete cooperation with the examiner and will extend the deadline to object to exemptions for 30 days after the examiner's final report is filed.

As important to this case as the factors the court must consider to convert a case are the factors the court must consider in denying a motion to convert. Under §1112(b)(2) the court will

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[24]Deposition of Jeffrey J. Prosser, 06-30009, Dkt. No. 174, Exhibit G-16 at 24.

[25]Deposition of Jeffrey J. Prosser, 06-30009, Dkt. No. 174, Exhibit G-16 at 114-15, 133-34.

[26]Jeffrey J. Prosser's Schedules of Assets and Liabilities, 06-30009, Dkt. No. 324, Exhibit G-7 at Summary of Schedules.

not convert the case over a party's objection, when conversion is found not to be in the best interest of the creditors and the estate, if debtor or another party in interest shows two things:

First, under §1112(b)(2)(A), a reasonable likelihood that a plan will be confirmed within statutory time frames or within a reasonable time. Here, Debtors have filed a plan but agree that the plan is unconfirmable. Debtors are still attempting to obtain funding to pay the discounted amount of $402 million to the RTFC and Greenlight Entities. Thus, the time when another plan that is confirmable can be filed is not known at this time. However, as a highly compensated individual with significant assets that could be dedicated to fund a plan, Prosser has different opportunities to confirm a plan than are available to the Corporate Debtors and the court cannot say, at this time, that confirmation of a plan in his case is not possible within a reasonable time.

Second, under §1112(b)(2)(B), the grounds for granting such relief include an act or omission, other than substantial or continuing loss to or diminution of the estate, for which there is a reasonable justification and a showing that there will be a cure within a reasonable time fixed by the court. This second element has not been established by Prosser. Rather, Prosser's schedules evidence huge liabilities and there is no evidence of when, if ever, the payments required to be made by Prosser (either pursuant to his guarantee of $100 million in the Terms and Conditions or the judgment amounts) will be paid, let alone evidence that the cure can be effected within a reasonable time. Moreover, there is evidence of a diminution in the estate as will be explained below.

Prosser has guaranteed $100 million of the corporate debt through the Terms and Conditions. He and the Corporate Debtors have had several chances to meet their obligations under the Terms and Conditions and, as reflected in the various hearings and pleadings that are

under seal, continually missed deadlines and changed the terms or parameters of the transactions including the identities of prospective investors/buyers. It is now more than a year since the involuntary cases were filed and more than six months since the voluntary cases were filed and still nothing more than statements of interest by potential buyers/investors have been produced.[27] The delay is prejudicial to creditors who relied on the fact that they would be paid a discounted amount (from over $656 million to $402 million) more than six months ago, *i.e.*, by July 31, 2006, and who have not yet been paid a cent. Although Prosser is but one of the three Debtors party to the Terms and Conditions, he is the controlling shareholder, CEO or managing director of the Debtors and the affiliated nondebtor signatories. At a hearing on January 30, 2007, Debtors announced that Prosser and/or certain nondebtor Prosser entities recently obtained a Memorandum of Understanding (MOU) for the sale of certain Down Island nondebtor assets.[28] A closing on that sale for a stated $70 million would assist the reorganization because, although the MOU is not a binding commitment and the Down Island assets are not estate assets, they are apparently part of the collateral that supports the liens of the RTFC and/or Greenlight. Sale proceeds, according to Prosser and his counsel, would be used to pay down part of the debt owed to RTFC and/or Greenlight. While everyone awaits this sale and other action in the cases, however, the creditors' security may be suffering because New ICC is bankrolling all of the Debtors and New ICC assets, among others, are the primary security for the debt. As the ultimate shareholder, Prosser benefits from the advances within the Prosser entities by New ICC, and from New ICC's lack of expectation of repayment and Debtors' inability to repay.

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[27]Sealed Transcript of 12/11/06 at 30-50.

[28]Transcript of 1/19/07 at 72, 73.

Greenlight also asserts that the loss of value in the estate will continue because Prosser's monthly expenditures of $114,750 plus the professional fees claimed by Prosser's counsel for the first three months of the case, which averaged over $25,000 per month, exceed his monthly income of $120,000. If Greenlight is correct and if Prosser fails to tighten his belt, then, at some point in the not too distant future, a renewed motion to convert the case may be met with a different result. However, it is still too early in this process for the court to conclude that this Debtor (whose annual adjusted gross income is over $1 million and whose unemployed wife owns real estate in two states and the territory of the Virgin Islands with asserted values of over $10 million and subject to mortgages of approximately $5 million) (*see* Prossers' Schedule A - Real Property) will be unable to find the means to pay creditors through a plan. If, indeed, he cannot, then conversion may follow. However, the court will exercise its discretion first to appoint an examiner to investigate the income and expenses claimed and to prepare a report on the reasonable likelihood of rehabilitation.[29]

Thus, at this juncture in the case, the lack of clear direction from Prosser as to, *inter alia*, a business strategy, a commitment as to how the funds will be obtained to pay claims, what Prosser's personal case reorganization is expected to be, what intercompany claims may exist that must be reconciled in the corporate and individual cases, etc., require fresh input.

Next, we examine when conversion is warranted. Pursuant to §1112(b)(4), "cause" for

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[29]Greenlight seems to posit that any plan must pay 100 percent to Prosser's creditors, *see* Greenlight's Motion to Convert (filed under seal), Dkt. No. 173 at ¶¶ 65 - 80, or that his obligations will be nondischargeable to such a degree that no plan can be confirmed that will not be met with later liquidation. No litigation has been brought, as yet, to test these assumptions and it is simply too early in the process to take away from Debtor the ability to negotiate and propose a plan.

conversion may be established by evidence of certain enumerated factors. The court will address only those that are applicable to Prosser's case, as follows:

(1) Substantial or continuing loss to or diminution of the estate and absence of reasonable likelihood of rehabilitation. From the evidence at trial, the court is not convinced that the Prosser estate is sustaining substantial or continuing losses. Prosser remains gainfully employed and there has been no evidence that any of his assets are being wasted. However, the evidence established a diminution value due to lack of controls on what Prosser is doing with his earnings and assets. The evidence established that Prosser is making mortgage payments on debts that, as to him, are unsecured because the properties subject to the mortgages are titled solely in his wife's name.[30] Although Prosser asserts that he is a co-obligor on the notes that represent the loans, he is not a record owner of the properties and is not obligated on the mortgage(s) that secure repayment of those loans. Thus, Prosser is paying some unsecured creditors while making no payments to his secured and judicial lien creditors. Even if Prosser is correct that Greenlight's judgment lien can be avoided as a preference, Prosser is preferring the unsecured mortgage creditor over Greenlight's unsecured claim. The court has ordered the payments to unsecured creditors to stop pending plan confirmation but, as yet, has no information as to whether, in fact, they have stopped inasmuch as the deadline to file the monthly operating report for January has not arrived. We further note that Prosser has had to restate his monthly operating reports to accurately reflect certain transactions. However, we credit Prosser's testimony and that of Bobby Lubana, the vice president of finance for New ICC, that the ambiguity on the reports was a function of utilizing information prepared in a fashion from a prepetition period

[30]Transcript of 1/19/07 at 89-98.

that provided for an annual "true up" of allocations of advances rather than a monthly one.[31] Once the format is corrected, the issues surrounding the reporting of information should disappear. However, the court finds that some oversight of that function, at least for a time, is appropriate.

(2) Gross mismanagement of the estate. Again, the evidence has not established that Prosser is mismanaging his own estate other than by paying claims that are not entitled to payment pending confirmation of a plan. The court does not minimize the jeopardy that arises when a debtor prefers some unsecured creditors over others. The real problem regarding the alleged mismanagement of the estate is that Prosser is confused or uninformed about what is titled in his name, in his wife's name and/or in joint names, and the creditors are entitled to a clear and independent assessment of the title to and status of his assets. For example, Prosser reports that he is paying the mortgages. Prosser states that he is obligated on the notes but not on the mortgages because he is not a title owner of the realty. Thus, as to Prosser, the mortgages are not secured claims because he apparently does not own the properties which stand as security for the loans. Although in his bankruptcy schedules Prosser stated that he owns the real estate by the entireties, Prosser testified that his wife alone owns most of the real estate (including a multi-million dollar home in Palm Beach, Florida, and a 10,000 square foot home that has been under construction in the Virgin Islands). Moreover, although he owns other assets in his own name, Prosser continually asserts that his wife (who is not a debtor and has not appeared before the court) claims an entireties interest in everything he owns, including stock in New ICC which is in Prosser's name alone, as to which he alone granted the RTFC a lien, and the shares of which

[31]Transcript of 1/9/07 at 124-26, 223-40.

are in the possession of the RTFC. Thus, there is need to clarify the status of Prosser's assets and the claims against him to know what assets he may claim as exempt in this case. The court finds only that conversion is a severe route to take to obtain clarity on these issues when a less severe alternative is available. This does not, of course, preclude reexamination of the appropriateness of conversion or appointment of a trustee or some other course of action after the examiner files a report.

There is another matter that has been adduced through the evidence that must be addressed. Even though New ICC has advanced sizeable funds to Prosser ($120,000 per month), New ICC is not listed as a creditor in Prosser's case, nor did Prosser, as the owner of New ICC, file a claim on behalf of New ICC. Prosser disputes that New ICC is a creditor. However, until the significance of the advances is established, New ICC's creditor status is at least something to be examined. The bar date for filing proofs of claim has expired. The significance of these events, if any, is not known and must be reviewed.

In addition, because the title to and value of assets, Prosser's entitlement to exemptions, and the claims against him are not clear, it is also not known at this time whether Prosser will have to place his postpetition disposable income into the plan funding in accord with §1129(a)(15). This, too, an examiner will investigate.

(3) Unauthorized use of cash collateral substantially harmful to one or more creditors. The creditors introduced most of their evidence to show that cash used by all three Debtors, including Prosser, is coming from nondebtor New ICC and that the cash reflects the value of their security in the stock or of their judgment liens against New ICC. Prosser, who is both a judgment debtor to Greenlight and a guarantor of the debt to RTFC, testified that his income

comes primarily from New ICC. A minor part of his income comes from dividends declared from stock in the Virgin Islands Community Bank that he owns but the dividends are not declared on a regular basis.[32] The status of the stock ownership in the Virgin Islands Community Bank is the source of another mystery. On Schedule D, "Secured Creditors," Prosser lists Virgin Islands Community Bank stock as pledged and indicates that it is jointly owned but "codebtor" is not checked regarding the liability for a $1.25 million claim, illustrating yet again the inconsistency and incompleteness of information in Prosser's schedules with respect to his assets and liabilities.

As a result of the fact that Prosser takes advances of $1 to $2 million per year[33] from New ICC, his guarantee of the debt owed by New ICC, a debt on which nothing has been paid since June of 2005, provides no comfort to the creditors at this point. Further, New ICC is funding Debtors by way of advances and Debtors have not yet obtained or even sought authority to incur debt outside the ordinary course of business, although a motion to continue "business as usual" has been filed. Debtors characterize the funding advances as "contra equity" and not as loans from affiliates. Prosser testified that the funding was called "contra equity" because New ICC had no expectation that the advances would ever be repaid by any of the Debtors. Transcript of 1/19/07 at 133. He testified that ICC LLC had negative value of $247 million. *Id.* at 147. He defined "contra equity" as "taking an asset . . . that would be recorded as an asset and transferring it . . . into negative equity because the belief is . . . from the auditor's standpoint . . . that the asset – in this case the receivable – was not collectible." Transcript of 1/9/07 at 114. He

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[32]Transcript of 1/9/07 at 147-49.

[33]Transcript of 1/19/07 at 88.

testified that contra equity would show on New ICC's books as a note receivable. *Id.* at 151. He testified that the "loans," his term, were never intended to be paid back. *Id.* at 153. However, at another hearing, he changed his testimony to say that when the note receivable was originally booked, there was an intent to repay it from a merger of certain companies but the merger was never effectuated.[34] Whether or not there was ever an intent to repay the money, the fact is that the advances are taking money out of New ICC and putting it into the hands of the three Debtors, none of which will repay the advances and all of which benefit Prosser as the ultimate shareholder in the corporate chain.

The testimony convinces the court that an independent analysis of the transfers in question, their effect on the collateral of the creditors, if any, and of their tax attributes or consequences, if any, must be made so that if any claims against the Debtors arose from the transfers, they can be dealt with in the bankruptcy estates. Again, however, conversion at this time is not warranted. Rather, an examiner who can prepare a report and assist in the analysis is warranted in Prosser's case and, as determined elsewhere in this opinion, a trustee will be appointed in the corporate cases.

(4) Failure to file a disclosure statement or to file or confirm a plan within time fixed by the Bankruptcy Code or by the court. Prosser filed an admittedly unconfirmable plan but did not file an accompanying disclosure statement. As stated earlier, the court is not convinced from the evidence that Prosser will be unable to propose a confirmable plan within a reasonable time. However, the court again views the assistance of an examiner regarding the status of assets and claims to be necessary. Thus, the motion to convert will be denied without prejudice so that an

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[34]Transcript of 1/19/07 at 126-28 (regarding "down stream merger").

examiner may investigate and report on Prosser's prospects for proposing and confirming a plan.

Grounds for conversion clearly exist. Conversion, however, is not the best solution for the creditors or for the estate at this time. Rather, as stated above, the court will order the appointment of an examiner and will extend the deadline for objections to claims of exemptions so as to facilitate the examiner's investigation and the parties' ability to make use of the examiner's report.

Conclusion

Appropriate orders will be entered.

Dated: February 13, 2007

Judith K. Fitzgerald rmab
United States Bankruptcy Judge

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